



August 14, 2017

The Honorable Scott Pruitt Administrator U.S. Environmental Protection Agency 1200 Pennsylvania Avenue, NW Washington, D.C. 20460

## Dear Administrator Pruitt:

On behalf of the State of Texas, we commend you for your commitment to restoring the principles of cooperative federalism under the Clean Air Act. We are committed to working with your administration to create a state implementation plan (SIP) by the end of next year to implement the best available retrofit technology (BART) requirements of the Regional Haze Rule. And we want to assure you that we will bring the full weight and resources of the State of Texas to bear on this issue.

As you know, Congress intended the Clean Air Act to be "[a]n experiment in cooperative federalism." *Luminant Generation Co. v. EPA*, 675 F.3d 917, 921 (5th Cir. 2012) (internal quotation marks omitted). The act gave the Environmental Protection Agency (EPA) the power to identify pollutants and set air quality standards. And Congress gave states "the primary responsibility for implementing those standards." *Id.* (internal quotation marks omitted); *see* 42 U.S.C. § 7407(a) ("Each State shall have the primary responsibility for assuring air quality within [its] entire geographic area."); *id.* § 7401(a)(3) ("[A]ir pollution prevention . . . is the primary responsibility of States and local governments.").

The principal way states implement air quality standards is through SIPs. The states have "wide discretion" in formulating those plans. *Union Elec. Co. v. EPA*, 427 U.S. 246, 250 (1976). And the Clean Air Act provides that EPA "shall approve" a SIP "if it meets the applicable requirements of this chapter." 42 U.S.C. § 7410(k)(3). Only where the state fails to meet those requirements does EPA gain the power to issue a federal implementation plan (FIP). *Id.* § 7410(c)(1). As the Fifth Circuit recently observed in a related case involving the Regional Haze Rule, "[t]he structure of the Clean Air Act indicates a congressional preference that states, not EPA, drive the regulatory process." *Texas v. EPA*, 829 F.3d 405, 411 (5th Cir. 2016).

We agree with you that, in recent years, this regulatory process has become both uncooperative and unproductive. Take first the uncooperativeness. Between January 2009 and January 2017, EPA imposed 56 FIPs. That is more than 10 times as many FIPs as were issued in the three

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preceding presidential administrations combined. EPA and Texas agree that imposing another FIP here would further unsettle the cooperative federalism that Congress intended to foster in the act.

We also agree that the Cross-State Air Pollution Rule (CSAPR) and the Regional Haze Rule prove that FIPs can be unproductive. In 2011, EPA imposed a CSAPR FIP on 27 states, including Texas, to limit the cross-state transport of certain air pollutants. That approach resulted in years of protracted litigation, and ultimately, the D.C. Circuit held that the Texas FIP was illegal and remanded the issue back to EPA. *See EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118 (D.C. Cir. 2015).

Similarly, in January 2016, EPA disapproved the Reasonable Progress portion of the Texas Regional Haze SIP and imposed a Regional Haze FIP on Texas. That FIP set "reasonable progress goals" that Texas must meet to restore natural visibility at two national parks and one federal wildlife refuge by 2064. EPA imposed that FIP because it concluded that Texas' reasonable-progress calculations were off by between 0.18 percent and 0.65 percent. And as a consequence of that "error," EPA's FIP would have required scrubber upgrades and retrofits at 15 electricity generation facilities at a cost of \$2 billion. The Fifth Circuit stayed that FIP and remanded it to EPA, again returning everyone to the drawing board. *See Texas v. EPA*, 829 F.3d 405 (5th Cir. 2016).

We agree with you that it is time to break the FIP-stay-remand cycle. Staff members in your office and at the Texas Commission on Environmental Quality (TCEQ) have been working together for months to implement the Regional Haze Rule in accordance with binding directions from the Fifth and D.C. Circuits. And rather than doing so through yet another FIP — this one to implement the BART requirement — we agree that a SIP provides a better path forward.

We think the BART SIP process should be motivated by three principles. The first is speed. Everyone wants to see clear rules in place as soon as possible. Citizens and environmental groups want to see measurable progress toward natural visibility. Power generators want certainty in their budgets. And consumers want to know their power grid is reliable. This all requires that this SIP be proposed and finalized faster than normal. After extensive consultation between staff members at TCEQ and EPA, we are confident that the BART SIP can be in place by the end of next year.

The second principle is cooperation. Much of the delay associated with the Regional Haze Rule — and CSAPR — stems from a lack of federal-state cooperation, both inside and outside the courtroom. We want to change that and to work collaboratively to establish a trading program that satisfies the BART and interstate visibility transport requirements. As part of that cooperation — and as a further measure to speed up this SIP process — the Texas BART SIP will ask for "parallel processing" by EPA under 40 C.F.R. Part 51, Appendix V.2.3.

Law is the third principle that will motivate this SIP process. The Fifth Circuit held that even without a Regional Haze BART SIP in place, Texas is already under the glide path that both the

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state and EPA calculated for restoring natural visibility. *See Texas*, 829 F.3d at 414-15; *see also* 79 Fed. Reg. at 74,887 (finding that measured visibility already exceeds reasonable progress goals under both Texas' 2009 SIP and EPA's FIP). We recognize the Fifth Circuit's decision means Texas and EPA will need to work together to fix the problem of over-control.

At the end of the day, we are confident the state and EPA together will create a regulatory program that is good for the air, good for the citizens of Texas and other states, fair to our state's power generators, and that satisfies the legal requirements of the Clean Air Act. We commend you for your commitment to working with the states rather than against them. And we look forward to working with you on this important project.

Sincerely,

Greg Abbott Governor

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Bryan W. Shaw, Ph.D., P.E.

Chairman

Texas Commission on Environmental Quality